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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. G155812-43A BY ROGERRIC J.))	
AND KAREN K. KNUTSON)	

* * * * *

The Hearing Examiner's Proposal for Decision in this matter was entered on February 27, 1989. The Proposal recommended that Application for Change of Appropriation Water Right No. G155812-43A be denied. The Hearing Examiner found that the Applicants had failed to prove this change would not cause an additional burden on the source and had not met their burden on the issue of adverse effect. Conclusions of Law 6 and 7, Proposal at pp. 19-23. The Applicants filed exceptions to the Proposal, and oral arguments were held before the Assistant Administrator of the Water Resources Division on June 19, 1989 in Livingston, Montana. Parties participating at the hearing were Peter Stanley, attorney for the Applicants, and Robert Queen for Objector Queen Ranches, Inc. Having reviewed the exceptions and the oral arguments, I find no error in the Hearing Examiner's conclusions, and affirm the Proposal.

In their exceptions, the Applicants argue that the Department has assumed without evidence that this Change increases historic water consumption. The Applicants argue further that

CASE # 155812

the real issue is not consumption but adverse effect, for which there is also no evidence. I will address the consumption issue first.

The issue is whether this Change will create an additional "burden on the source". See Conclusion of Law 6, Proposal at p. 19. In changing some aspect of a water right, an appropriator may not increase the volume of water that was historically diverted. Any increase of historic volume would not be a "change" but a new appropriation with a new priority date. Thus, as a jurisdictional matter, the Department cannot approve an increased burden on the source, i.e., increase in historic volume, in a Change proceeding. To this extent the burden on the source limitation is independent of whether there are adverse effects upon other water users.

In this case, the Applicants proposed to nearly double their historically irrigated acreage. This fact indicates prima facie an increase in historic withdrawals from the source. The Department's Bozeman field office concluded as much in its Field Investigation Report of March 1, 1983. Under these circumstances, it was proper for the Hearing Examiner to require the Applicants to address the burden on the source issue. Because the Applicants provided no explanation as to how a major acreage increase would not consume more water, the application was properly denied. I disagree with the Applicants' claim that the Change was denied without evidence. The unexplained acreage increase constitutes persuasive evidence of increased consumption.

In this case, increasing the burden on the source also will lead to adverse effects upon other water users. As stated in Conclusion 7, diverting a greater volume of water from Rock Creek, even at the historic flow rate, will reduce the amount of water available at downstream water users' points of diversion. Proposal at p. 23. Several downstream Objectors testified at the hearing that further reductions in Rock Creek would adversely affect them. See Finding of Fact 13, Proposal at pp. 11-13. The Applicants must prove that their Change will not cause adverse effect to other water users. Section 85-2-402(2)(a), MCA. Their failure to address the burden on the source issue left the Department no alternative but to conclude that adverse effects were likely to result from this Change. Again, this conclusion is based on the evidence that the Change increases historic irrigated acreage, which, absent a strong showing to the contrary by the Applicants, indicates an increase in historic diversion volumes.

Aside from the increased diversions, there also is evidence that this Change will decrease historic return flows, to the detriment of downstream water users. The Objectors testified that they depended on historic return flows, which they characterized as "considerable" and "significant". See Proposal at pp. 13-14. Mere assertions to the contrary by the Applicants do not prove their case. The statute requires not only substantial credible evidence but also "proof" of the listed criteria. Section 85-2-402, MCA. "Proof" clearly implies submission of

sufficient evidence to prevail over contrary evidence in the record. Proof must be by a preponderance of the evidence unless the statute directs otherwise. See § 85-2-311(2), MCA, (applicants for new use permits for 4000 or more acre-feet per year and 5.5 or more cfs must prove criteria by clear and convincing evidence).

For the foregoing reasons, I find the Applicants' exceptions without merit, and I affirm the Proposal for Decision. All the Findings of Fact and Conclusions of Law of the Examiner are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the exceptions and oral arguments, the Department of Natural Resources and Conservation makes the following:


ORDER

Application for Change of Appropriation Water Right No. G155812-43A by Rogerric J. and Karen K. Knutson is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 19 day of September, 1989.


Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East Sixth Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, certified mail, return receipt requested, at their address or addresses this 19th day of September, 1989, as follows:

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. G155812-43A BY ROGERRIC J.)
AND KAREN K. KNUTSON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 29, 1988, in Livingston, Montana.

Applicant Rogerric Knutson appeared at the hearing in person, and by and through counsel Peter Stanley. (Applicants Rogerric and Karen Knutson hereafter will be referred to as "the Applicant".)

Jay Bailey, an employee of Mr. Knutson's, appeared as a witness for the Applicant.

Ed Skillman, the current water commissioner for Rock Creek, appeared as a witness for the Applicant.

Objector C. Phillip Gilbert appeared at the hearing in person, and by and through counsel Leanne Schraudner.

Objector Queen Ranches, Inc., was represented at the hearing by Robert Queen and counsel Leanne Schraudner.

Kenneth Chapel, former water commissioner on Rock Creek, appeared as a witness for Objectors Gilbert and Queen Ranches, Inc.

CASE # 155812

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Objector Richard Quist appeared at the hearing in person. Robert Tanner appeared at the hearing as an interested party.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared at the hearing as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

The Applicant offered one exhibit for inclusion in the record in this matter:

Applicant's Exhibit 1 is a USGS quad map of the area where the Applicant's property is located (Clyde Park Quadrangle). The map was marked at the hearing by the Applicant in blue ink to show the Applicant's point of diversion from Rock Creek and the route of his diversion ditch, and in orange ink to show the point of diversion and route of the Big Ditch.

Applicant's Exhibit 1 was accepted for the record without objection.

The Objectors offered one exhibit for inclusion in the record:

Objectors' Exhibit 1 consists of photocopies of six Statements of Claim for Existing Water Rights, filed by Nancy and Charles Gilbert. (Claim Nos. 191892, 191893, 191896, 191897, 191898, and 191899, all in Basin 43A.)

Objectors' Exhibit 1 was accepted for the record without objection.

The Department file was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

PRELIMINARY MATTERS

Robert Tanner is an appropriator with Rock Creek water rights, and therefore requested the opportunity to appear at the hearing although he was not a timely objector. Counsel for the Applicant objected to the participation of Robert Tanner at the hearing, on the basis that counsel was unaware that Mr. Tanner would be involved in the process and therefore was not able to prepare for cross-examination of Mr. Tanner.

Administrative Rules of Montana 36.12.219 allow the hearing examiner to "hear testimony and receive exhibits" from an untimely objector, although no untimely objector may become a party to the matter by reason of such participation. Further, upon review of Mr. Tanner's testimony, the Hearing Examiner finds that the Applicant is not unduly injured by lack of cross-examination, since Mr. Tanner's testimony consisted of general allegations for which no special rebuttal preparation would have been necessary. Therefore, the Hearing Examiner overrules the Applicant's objection to Mr. Tanner's testimony.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in this matter.

2. Application for Change of Appropriation Water Right No. G155812-43A was duly filed with the Department of Natural Resources and Conservation on August 17, 1982 at 5:00 p.m.

3. The pertinent portions of the Application were published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on December 15, 22, and 29, 1982.

4. The source of water for Claimed Water Right No. G155812-43A is Rock Creek, a tributary of the Shields River.

5. The Applicant filed Statement of Claim for Existing Water Rights for Irrigation No. 155812-43A on April 30, 1982, claiming 175 miner's inches up to 7,780 acre-feet of water for irrigation of 200 acres. The place of use was amended on August 17, 1982 to 155 acres: 105 acres in the NE $\frac{1}{4}$ and 10 acres in the

NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, and 45 acres in the S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, all in Township 2 North, Range 10 East, Park County, Montana. The priority date also was amended, from March 3, 1911, to May 10, 1885.

6. The Applicant has applied to change the place of use of a portion of Claim No. 155812-43A, and extend the number of acres irrigated by the portion by changing the means of diversion from flood irrigation to sprinkler irrigation.

The Applicant has requested that he be allowed to change 900 gallons per minute ("gpm") up to 1,656.4 acre-feet of water per year from use on 33 acres of the claimed place of use in the S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 to sprinkler irrigate 126 acres of land located in the SE $\frac{1}{4}$ of Section 19, Township 2 North, Range 10 East. The 33 acres formerly flood-irrigated would be covered by the center pivot sprinkler system. The Application in this matter specified a 140-acre proposed place of use; however, the Applicant testified at the hearing that the pivot actually covers a total of 126 acres.

7. The Applicant alleged that another 30 acres of the proposed place of use above Smith Ditch was irrigated by hand line in July, 1973 and again in 1981. One of the ditch riders and an objector testified that they had never seen any evidence that such irrigation ever existed (testimony of Queen, Chapel). However, even if such irrigation did take place it occurred subsequent to the effective date of the Montana Water Use Act,

and therefore would have required a change authorization for place of use. (See Section 28, chapter 452, L. 1973.) Since no such authorization was granted, the acres designated as "new" irrigation (acreage not previously irrigated) for purposes of the present Application will be 93 (126 acres under the pivot minus the 33 acres previously flood-irrigated), and this amount will not be reduced by the alleged 30 acres of hand line irrigation.¹

8. The Applicant diverts water pursuant to Claimed Water Right No. 155812-43A out of Rock Creek at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 2 North, Range 10 East, through a ditch known as the Smith Ditch or Ditch No. 9 (hereafter "Smith Ditch"). This ditch serves only the Applicant at the present time, since it has been plowed in on the adjoining property and

¹ At more than one point during the hearing, the Applicant stated that the 155 acres claimed on Statement of Claim No. 155812-43A includes the alleged 30 acres of hand line irrigation. However, Statements of Claim are limited to uses which occurred prior to the effective date of the Montana Water Use Act, as discussed above. See § 85-2-212(1), MCA. The map accompanying the Statement of Claim does not show the 30-acre parcel. Further, in response to a question by Objector's counsel, the Applicant stated that only 33 acres of the claimed 155 acres will be covered by the center pivot. This 33 acres corresponds to the area which previously was flood-irrigated. See Finding of Fact 6. The exact location of the claimed acreage is hard to determine, since at one point the Applicant testified that the 155 acres includes the 105-108 acres he has been flood-irrigating, plus the 30 acres he first irrigated in 1973, plus "creek bottom" acreage; at another point he testified that it included the flood irrigation plus the 30 acres, plus wheel line. However, the places of use claimed for the 155 acres do not match the legal description the Applicant gave of the alleged 30 acres of handline.

therefore dead ends at the edge of the Applicant's property. (Testimony of Applicant, Objector Gilbert.) The Applicant proposes to divert water for the new place of use from Smith Ditch at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, Township 2 North, Range 10 East.

Another ditch known as the Community Ditch or Big Ditch (hereafter "Big Ditch") runs east-west through approximately the center of the Applicant's flood irrigation below the Smith Ditch.

(See Applicant's Exhibit 1; file map marked with past flood irrigation in green, new sprinkler irrigation in red.) The Applicant and witness Jay Bailey testified that waste water from the Applicant's lands above the Big Ditch is captured and flumed across the Big Ditch to irrigate the Applicant's lands below the Big Ditch, and also is captured in the Big Ditch and rediverted to irrigate these lower lands.

9. The past places of use for the Claim in this matter add up to 155 acres, all located below the Smith Ditch. (See Statement of Claim No. 155812-43A.) The Applicant testified that he has been irrigating 105 to 108 acres of this acreage since he took possession of the property in 1966. He further testified that he uses the full claimed 175 M.I. at all times throughout the irrigation season. Applicant's employee Jay Bailey also testified that the full 175 M.I. was used, and water commissioners Ed Skillman and Kenneth Chapel testified that they had delivered

175 M.I. at the Applicant's point of diversion and that none of the water was ever turned back into the creek at the diversion.

The Applicant testified that the 175 M.I. is not an "excessive amount" for flood-irrigating the 108 acres, especially in a hot, dry year. He stated that they could split up the flow rate to use on more than one pasture or field at a time.

Ed Skillman testified that the Applicant has a measuring device located in Smith Ditch, at a point approximately 500 yards from Rock Creek, which is adequate to measure the diverted water "fairly accurately".

10. The Applicant proposes to split the 175 M.I. flow rate which has been used fully for flood irrigation, and use it on the flood-irrigated acres below Smith Ditch and also for the center pivot sprinkler system, which irrigates 93 acres above Smith Ditch and 33 acres previously below the Ditch.² The Applicant testified that the 175 M.I. flow rate is sufficient to allow 900 gpm to be used for the sprinkler system, and the remainder for flood irrigation of the remaining 75 to 122 acres below Smith Ditch (depending upon whether the Applicant continues to flood irrigate the balance of the 105-108 acres he has flood irrigated, or irrigates the balance of the claimed acreage.)

The Applicant testified that he believes the balance of the flow not diverted for the sprinkler is sufficient for full

² The applied-for change proposes to change about 46% of the flow rate over to the sprinkler system.

irrigation of the acres remaining in flood irrigation, through "better management" of the water and by picking up waste water and using it elsewhere. Also, whenever the pivot is not being irrigated, the 900 gpm could be used for flood irrigation. Jay Bailey testified that he could not honestly say that fully irrigating "that much more" acreage can be done, although he thinks it can if they get some precipitation.

11. The volume of water claimed on Statement of Claim No. 155812-43A is 7,780 acre-feet of water for use on 155 acres (approximately 50 acre-feet of water per acre of land). (In the Temporary Preliminary Decree, this volume has not been recognized - since the Water Court is not utilizing volume measurements - but has been replaced with the statement that "the total volume of the right shall not exceed the amount historically used for a beneficial purpose".) The Application in this matter proposes to change 1,656.4 acre-feet of water (the proportional share of volume for the 33 acres of the claimed place of use now to be sprinkler irrigated) for use on the 126 acres of pivot irrigation (approximately 13 acre-feet of water per acre).

The Applicant did not discuss the past use of water in terms of how the claimed flow rate was utilized to achieve the claimed volume or how the claimed volume was used, nor did the Applicant explain how the sprinkler system provides full service irrigation utilizing only approximately one-quarter of the volume per acre that was needed under flood irrigation.

12. The Applicant did not set forth any specific method by which nearly twice as much acreage as he has been flood irrigating (126 acres under pivot plus a minimum of 75 acres of flood irrigation, compared to 105-108 acres of flood irrigation) can be irrigated using the same volume of water as was used for flood irrigation only. The Applicant also did not explain how the water previously used on 33 acres can be utilized to irrigate nearly four times as much acreage, even given the increase in efficiency of sprinkler over flood irrigation.

The Applicant can capture waste water from the fields between Smith Ditch and the Big Ditch and flume it over the Big Ditch for use on lower acreage. However, based on the testimony of the Applicant and his witnesses, this practice is part of the present pattern of use and therefore should not provide much additional "savings". In addition, part of the acreage between the Smith Ditch and the Big Ditch which has been flood irrigated now will be under sprinkler irrigation, which the Applicant admitted would have little or no runoff; arguably, there will be less waste to recapture for use below the Big Ditch.

Scott Compton testified that he believes only slightly more than 13 acres of land could be added to the present place of use without increasing the consumptive use of water. (See March 1, 1983 Field Report and August 15, 1988 report, both prepared by Mr. Compton.) Mr. Compton stated that he believes the Applicant's hypothesis concerning service of the additional

acreage are unrealistic, since it is not physically possible to split the low rate nearly in half and irrigate the remaining acres of flood irrigation in the same time period, with the same volume of water, using only half the previous flow rate.³

13. The concern of the Objectors in this matter is that the Applicant will consumptively use more water under the proposed expansion of acreage, thereby reducing the amount of water available to meet their own water requirements.

Philip Gilbert, who diverts water from Rock Creek by means of the Big Ditch, testified that he and other water users on the Big Ditch (Livingston, Quist, and Tanner, as well as the Applicant) make use of the runoff from water which is applied on lands above the Big Ditch and which runs off into the ditch. He stated that he and the other Big Ditch users will be adversely

³ Counsel for the Applicant requested Mr. Compton to make a series of calculations, based in part on testimony by other witnesses and figures provided by counsel, designed to show that the proposed expansion of acreage could be made without increasing the amount of water consumed. However, a review of these calculations indicates that each step is based, not on assumptions supported by evidence in the record, but on hypotheticals. Therefore, these calculations have not been given any weight in the Hearing Examiner's determination.

During his cross-examination of Scott Compton, counsel for the Applicant also implied that water "savings" could be achieved through such actions as repair of the Applicant's diversion ditch, which apparently is in poor condition. (Testimony of Ed Skillman.) However, nothing in the record indicates that the Applicant intends to take the various steps suggested by counsel or that these steps, if taken, would provide sufficient water to cover the expanded acreage. The measures reflect the hypotheses of Applicant's counsel, not the testimony of any party.

affected if this flow is diminished by the Applicant's proposed changes. Ed Skillman testified that water from the Applicant's property is picked up for use by others on the Big Ditch. Since the Big Ditch carries this water away from the creek and it does not return to the source of supply, it is waste water rather than return flow, and is available for whoever diverts it. (Testimony of Ed Skillman.)

Robert Queen testified that he has water rights on Rock Creek, below the Smith Ditch and Big Ditch. He stated that water from Hammond Creek, and from "an unnamed tributary" west of Hammond Creek which is a drainage on the Applicant's property, feed Rock Creek and provide part of his source of water. He testified that he believes the Applicant's proposed change will adversely affect him by reducing the return flow which feeds Rock Creek.⁴

Scott Compton testified that Harry Livingston, another Rock Creek water user who diverts water through the Big Ditch system and who was one of the original objectors to the change in this matter, had showed him areas of land he claimed he was no longer able to irrigate because the Applicant's pumping for the center

⁴ Counsel for the Applicant asked Mr. Queen if a slight reduction in the Applicant's rate of diversion would not make up for any losses in return flows. Mr. Queen responded that the 5 to 10 M.I. "bypass" proposed would not be enough. No further discussion was made of whether a "bypass" flow would mitigate the adverse effects to downstream appropriators, or of the amount by which the Applicant's diversion which would have reduced in order to eliminate adverse effect.

pivot had eliminated flows which he previously had been able to pick up. (See Compton's March 1, 1983 Field Investigation.)

Objectors Gilbert, Queen, and Quist testified that they have not been able to obtain their full water rights and have had some of their rights shut off early.

14. The Applicant's present system of flood irrigation results in return flows which enhance the flow of Rock Creek, although the evidence on the record does not make it possible to determine the exact amount or pattern of the return flows.

The Applicant and his witness Jay Bailey testified that the use of the sprinkler system will cause "some" change to runoff, since there will not be runoff from sprinkler-irrigated lands like there is from flood-irrigated acreage. They stated that they do not know exactly what effect the change will have. Mr. Knutson testified that any "runoff" from lands above the Big Ditch ends up in the Big Ditch, while flow from lands below the Big Ditch ends up in Rock Creek. He estimated that perhaps 20% to 30% of the water applied to the lower 73 acres ends up as runoff, depending upon the weather. He stated he believes "not much" of the water makes it to Queen Ranch, but said that it would take a considerable amount of study to determine how much water reaches the Ranch.

Ed Skillman testified that historically there has been "considerable" return flow from the Applicant's irrigation, at least at times. Ken Chapel characterized the amount of return

flow as "significant", and stated that it definitely benefits Queen Ranch and other Rock Creek water users. Mr. Chapel hypothesized that water applied above the Big Ditch may go subsurface and emerge lower as springs, and estimated that sometimes as much as 100 M.I. out of the 175 M.I. diverted ends up returning to the source after a long irrigation season. Robert Queen testified that he went up to the Applicant's property in 1983 with Ken Chapel, and that there was an estimated 60 M.I. to 85 M.I. of water running from the Applicant's land into the unnamed tributary of Rock Creek which consists of a drainage (west of Hammond Creek) on the Applicant's property. Mr. Queen stated that he does not know how much flow is usually in the tributary.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. At the time of the Application in this matter (1982), the change statute required the Department to issue a change authorization if it determined that the proposed change would not adversely affect the rights of other persons. See § 85-2-402(2), MCA (1981). In 1985, the statute was amended to require the Department to find that the proposed use will not adversely affect the water rights of other persons, that the proposed use of water is a beneficial use, and that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See § 85-2-402(2), MCA (1985).

The Montana Session Laws specified that these changes in the statutory criteria would apply to all change applications filed and pending with the Department on July 1, 1985, but upon which a hearing had not commenced. See 1985 Montana Laws, Chapter 573, §§ 7 and 27. Since the Application in the present matter was pending on July 1, 1985, but a hearing had not commenced, the statutory criteria as amended in 1985 apply to the Application for Change in the present matter.

4. The Applicant argues that the burden of proof set forth in the current version of § 85-2-402, MCA, also does not apply to the application in this matter, since the placement of the burden of proof on the Applicant in a change proceeding was not specified in the change authorization statute until 1985, subsequent to the

priority date of the Application.⁵ However, the Department has held, and the Hearing Examiner herein reiterates, that the burden of proof in an application for change of an existing right since the enactment of the Montana Water Use Act is upon the applicant, and that the present wording of § 85-2-402, MCA, simply spells out the burden of proof put into effect by the inception of the Act.

The right to change the utilization of a perfected water right is one of the components of the underlying usufructuary interest. However, the exercise of this right is limited by other appropriators' property interest in maintenance of the stream conditions. Therefore, a change in water use has always been subject to scrutiny and to the possibility of being disallowed if the reviewing court or administrative agency determines that the change will cause adverse effect to the water rights of other appropriators.

Historically, under common law and the case law derived from it, no procedural mechanism existed to require a review of a proposed change prior to its implementation. Even after a change was made, no review took place unless another appropriator felt that the results of the change adversely affected his own water use, and therefore applied to the judicial system for

⁵Section 85-2-402(2), MCA (1981) states, "The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons." Compare with § 85-2-402(2) (1987), which states that "... the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met. . ."

relief. Under such a scheme, the objector to the change was the proponent in the action, as well as being in the best position to prove the issue of adverse effect since he had experienced the results of the change, and presumably could give the court evidence of the kind and quantity of harm which he had experienced due to the change.

With the inception of the Water Use Act in 1973, however, changes in appropriation rights no longer were reviewed retrospectively, but rather are reviewed prospectively, since an appropriator may not initiate the change without prior departmental approval. See Section 28, chapter 452, L. 1973 (codified at Title 89, Section 892, Revised Codes of Montana): "An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage without receiving prior approval of such change from the department." Further, the Department is required to make a prospective determination that the proposed change would not adversely affect the rights of other persons.

When the review of a change shifted from "after the fact" to prior to the initiation of the change, other water users lost their ability to present factual evidence of adverse effect. However, the Applicant - as proponent of the change - retained full knowledge of the extent and characteristics of the proposed change. Therefore, the Applicant logically has the initial burden of production on the kind and character of his intended

change in water use. The Objectors then have the burden of production concerning the utilization of their water rights and how the proposed change as set forth by the Applicant may adversely affect these rights.

However, since the Objectors can only hypothesize about possible effects, and since it is the Applicant who has full information, not only about the parameters of the proposed change, but also about possible conditions or modifications to the change which will mitigate or eliminate effects to other water users, the Applicant for a change of water right bears the burden of persuasion on the issue of adverse effect. (For a more complete discussion of the burden of proof in a change, see October 19, 1984 Memorandum and Order In the Matter of the Application for Change of Appropriation Water Right No. 7325-c41M by Kingsbury Ditch Company.)

As stated in the Kingsbury Ditch Memorandum, supra:

The burden of proof being a procedural rule, the substantive right of the Applicant has not been altered. To argue otherwise would say that an appropriator has always had a substantive right to change his water use to the injury of other appropriators. This has never been the rule in Montana. See Title VIII, Section 1882, Civil Code, 1895, and statutes succeeding thereto. . . . The shift in burden of proof cannot be said to impinge the constitutional mandate protecting and recognizing all existing rights to the use of waters as the existing right included the right to change a use only when other appropriators were not affected thereby. General Agriculture Co. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975).

5. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

6. The Applicant has not provided substantial credible evidence that he can operate his proposed irrigation system without causing an additional burden on the source.

The Applicant has not explained how he can nearly double his irrigated acreage without consumptively using more water than is used for his present flood irrigation system. (See Findings of Fact 11 and 12.) Nothing in the record in this matter, nor common sense, provides an explanation of how the same amount of water which, by the Applicant's own testimony, has been needed for full service irrigation of 105 to 108 acres (Finding of Fact 9) can now be made to irrigate 201 acres, especially when nearly three-quarters of the 108 acres will still be flood-irrigated as before.

While it appears technically feasible for the Applicant to use the claimed 175 M.I. flow rate for the sprinkler system and for flood irrigation (see Finding of Fact 10), the obvious result is that it would take the Applicant longer to cover the remaining flood irrigation, since only slightly over half the claimed flow rate is available for flood irrigation while the sprinkler is being operated. To the extent that the Applicant extended the period of diversion to obtain the flow rate long enough to cover all of the acreage, there would be an additional volumetric

burden on Rock Creek, whether or not the flow rate itself increased.

The Applicant argues that the remaining acres of flood irrigation can be irrigated with the balance of the flow rate not used for sprinkler irrigation, through "better management" of the water, (see Finding of Fact 10); however, he did not specify how this management would be done to avoid increased volumetric diversion. The Applicant did not provide any information as to how much "additional" water he could make available through this method, given the facts that he already recaptures and reuses some portion of it and that there would be less water reaching the Big Ditch if part of the lands are under sprinkler irrigation. (See Finding of Fact 12.)

However, the Applicant has no mechanism for recapturing the water which flows from the lands below the Big Ditch, nor is he entitled to do so, since the testimony indicates that this water is return flow which enhances the flow of Rock Creek and which is used by Rock Creek water users such as Mr. Queen. Furthermore, Mr. Knutson is not entitled to so "manage" the water that no runoff would occur, since these waters are part of the stream conditions to which other appropriators are entitled. An appropriator may not make a change which will result in a net increase in stream depletion. See, In the Matter of the Application for Change of Appropriation Water Right No.

G34573-76H by Carrie M. Grether, September 10, 1986 Final Order.⁶

Therefore, no water can be "saved" from the irrigation of lands below the Big Ditch for use on the Applicant's proposed additional acreage.

Apart from his general suggestion of better water management, the Applicant did not produce any information as to how irrigation of the expanded acreage with the same amount of water can be achieved.

⁶"Return flow" and "waste water" both are categories defining waters which have been diverted by an appropriator and which are "left over" at the end of the appropriator's water distribution system. However, waste water is left over water which does not, has not, and would not rejoin the source of supply, while return flows do or would "return" to the source.

Since waste waters do not constitute part of the stream condition to which other appropriators are entitled, the original appropriator may recapture and reuse these waters. To the extent that such reuse exceeds the appropriator's historical capture and use of these waters, it likely constitutes a new use. However, as a practical matter, it does not make a difference to other appropriators of the waste water at what time the original appropriator first decides to recapture and reuse, since the other appropriators have not (under current law) obtained a vested right to the continuance of waste water because the original appropriator cannot be compelled to continue supplying it. See, Newton v. Weiler, 87 Mont. 164 91930), Popham v. Helloran, 84 Mont. 442 (1929). (For an argument that the other appropriators have acquired a right to use of the waste water, see Stone, Montana Water Law for the 1980's, pp. 34-35.)

In the case of return flow, however, the water historically has returned to the source and is made available for use by other appropriators, who can obtain vested rights in its use. The original appropriator may not shut off this source of water. He may, of course, discontinue the use which produces the return flow; however, this would result in the water going undiverted past his point of diversion in the source and remaining in the source to meet the needs of downstream users.

7. The Applicant has not met his burden of proof on the issue of adverse effect. (See Conclusion of Law 3.)

The water which flows off the Applicant's lands into the Big Ditch is waste water which does not return to the source, and for which the other appropriators on the Big Ditch do not have a water right. (See discussion, above.) Therefore, even if the Applicant's proposed changes should result in less waste water being available for use by the other appropriators, this impact legally does not constitute adverse effect to the water rights of other persons. However, the Applicant has failed to show that his proposed changes would not result in a longer period of diversion or diversion of a greater volume (Conclusion of Law 5, above), which would adversely affect these Objectors by reducing the amount of water available to fulfill their junior water uses from Rock Creek, since they divert through the Big Ditch, which is located downstream from the Applicant's point of diversion for Smith Ditch.

The Applicant also has failed to provide substantial credible evidence that other Rock Creek water users downstream from his point of diversion will not be adversely affected by his proposed change. If the Applicant diverts a greater volume of water from Rock Creek, even at the same flow rate, it will reduce the amount of water available to meet downstream users' needs. Even if the Applicant limits his diversion to the same volume of water which has been used for flood irrigation, however, the

water will have to be managed to stretch over the additional acreage, which logically cannot be done without having an effect on the amount of return flow. If the return flow is reduced or eliminated, downstream Rock Creek users such as Mr. Queen will be adversely affected: testimony indicates that downstream users are not receiving their full water rights even now, so clearly further reduction in Rock Creek will cause adverse effect. (See Finding of Fact 13.)

The Applicant testified that he does not believe that much of his return flow makes it to Queen Ranch, but admitted that he does not know what the amount is or how his proposed change would affect it. Testimony by other parties and witnesses, however, indicates that the amount of return flow from the Applicant's land is considerable. See Finding of Fact 14. This flow is part of the "stream conditions" of Rock Creek, upon which the downstream users are entitled to rely. The Applicant did not provide testimony or evidence as to how his irrigation could be managed, or how a change authorization could be conditioned, so as to eliminate this adverse effect to the water rights of other persons.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G155812-43A by Rogerric and Karen Knutson is denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party.

Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 27th day of February, 1989.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 27th day of February, 1989, as follows:

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